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I.

IN THE

Court of Appeals of Indiana

THIRD DISTRICT

WALTER E. FRITZ and RAMONA J. FRITZ,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 1171 A 229
TOWN OF CLERMONT,	)	
Defendant-Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT, ROOM NO. ONE

HONORABLE CHARLES C. DAUGHERTY, JUDGE

HOFFMAN, CHIEF JUDGE.

This appeal is from a judgment of the trial court against the Plaintiffs-appellants Walter E. Fritz and Ramona J. Fritz on their amended complaint appealing a sewer construction assessment. The primary issue here presented is whether a 32.7 acre tract of land already receiving sewer service is specially benefited by the construction of "trunk and main" sewers within a designated assessment area.

The instant appeal turns upon the interpretation to be given to Acts 1967, ch. 128, as found in IC 1971, 19-2-7-1 to 19-2-7-20, Ind. Ann. Stat. §§ 48-3948 to 48-3967 (Burns Cum. Supp. 1972). We will not here set forth each of the

above-named statutes verbatim. Instead, we will merely summarize the relevant portions of the pertinent statutes.

Section 48-3950, *supra,* provides that whenever the board orders the construction of any local sewer the cost of which is to be assessed against property, a hearing must be held on the question as to whether the specific benefit that will accrue to the property to be assessed, the abutting property, will be equal to the estimated cost of the improvement.

Section 48-3951, *supra,* provides that after the hearing the original resolution may be rescinded, confirmed or modified. Whenever any sewer shall be intended to be used for receiving sewage from collateral drains a hearing must be held to determine the question whether the area is properly bounded for drainage, whether other territory should be included, whether any real estate should be excluded therefrom, and whether the special benefits to the several parcels within the area will be equal to the estimated cost of the improvement. Procedure for conducting such hearing is set forth in § 48-3952, *supra.*

Section 48-3954, *supra,* provides that when a sewer is intended only for use by property owners along the line of the street on which it is constructed, then the parcels so abutting shall be assessed primarily for the cost of the improvement and the costs shall be apportioned according to the areas of the abutting lands.

Section 48-3957, *supra,* provides that whenever the sewer shall be intended to receive sewage from collateral sewers then the cost shall be divided as follows: so much of the cost equivalent to the cost of a local sewer (§ 48-3954, *supra*) shall be primarily assessed against the abutting property holders. The excess cost shall be primarily assessed against each parcel of land in the district to be

drained in the proportion that that parcel bears to the total area of the district.

Section 48-3958, *supra,* provides that in making assessments for the construction of any sewer, the board shall make out an assessment roll, with the names of the property owners and description of the property primarily assessed for the sewer.

The assessment roll shall also have the total primary assessment against each parcel as the special benefits accruing to the parcel by reason of the improvement.

A notice must be given stating that the assessment roll, with the names of the owners and descriptions of property to be assessed, with the amount of the primary assessment against each parcel, is on file in the office of the board. The notice must name a day on which the board will hear remonstrances against the amounts assessed and will hear and determine the question as to whether the parcels will be specifically benefited by the improvement in the amounts stated in the roll.

The latter section bears extreme importance to the instant appeal. To repeat what we have said, § 48-3958, *supra,* states, "[i]n making assessments * * * for the construction of any sewer, * * * the board shall, * * * make out an assessment roll, * * *." The assessment roll shall contain the total primary assessment against each parcel of land as the special benefits accruing thereto. See: § 48-3958, *supra.* Thereafter, the board 1) will receive and hear remonstrances against the amounts assessed; and 2) will hear and determine the question as to whether the parcels of land have been, or will be, specially benefited by the improvement in the amounts stated and set forth in the roll.

The foregoing statutes must here be applied to the following facts:

Walter E. Fritz and Ramona J. Fritz are the owners of a parcel of land containing approximately 32.7 acres located within the corporate limits of the Town of Clermont, Indiana. On June 1, 1967, a perpetual easement was granted by Walter E. Fritz and Ramona J. Fritz to the City of Indianapolis, Indiana. Said perpetual easement was duly received for public record by the recorder of Marion County, Indiana, on August 9, 1967. The terms of the perpetual easement provided, *inter alia*, that the grantee-City of Indianapolis could enter upon the described real estate of the grantors for the purpose of constructing, maintaining, and operating a sewer line for collection, carriage, treatment and disposal of the waste, garbage, sewage, storm water and refuse of the City of Indianapolis. The grantors were granted the authority to hook up to the four manholes located on their property.

On January 18, 1968, the Board of Trustees of the Town of Clermont unanimously resolved that a sanitary sewer system be constructed within the Town of Clermont, and that the area to be assessed to pay for the Clermont sanitary sewer system is the corporate boundaries of the Town of Clermont. Notice of such resolution was duly given and a hearing was scheduled for February 5, 1968, to hear remonstrances and to determine whether the special benefits to the land within the area assessed and to the Town would be equal to the estimated cost of the improvement.

At such hearing all interested persons were given an opportunity to be heard and Resolution 1968-2 was passed confirming the prior resolution in all respects. On May 17, 1968, Resolution 1968-3, a primary assessment roll for the construction of the Clermont Sanitary Sewer was re-

ceived by the Board of Trustees and a hearing on the assessment contained in the assessment roll was set for May 31, 1968.

A hearing was held on May 31, 1968; however, the Board of Trustees of the Town of Clermont failed to give sufficient notice of such hearing to the Fritzes as found by our Supreme Court in *Fritz v. Bd. of Trustees* (1969), 253 Ind. 202, 252 N.E. 2d 567.

A subsequent hearing was conducted on January 20, 1970, to hear the remonstrance of Walter E. Fritz and Ramona J. Fritz, appellants herein. At the latter hearing it was resolved that the assessment in the amount of $17,827.44 against Walter E. Fritz and Ramona J. Fritz be confirmed. Pursuant to § 48-3960, *supra*, an appeal was taken to the Marion Superior Court which entered judgment affirming the area assessments against appellants.

Appellants' motion to reconsider and correct errors, timely filed, was overruled, and this appeal followed.

On appeal appellants contend that the judgment of the trial court is contrary to law, and in their briefs argue the following four propositions:

1. The Town sewer did not confer a special benefit to the land of the plaintiffs, which was already adequately served by pre-existing new interceptor sewer.
2. The defendant-Town made no determination of special benefits to the land of the plaintiffs and thereby failed to satisfy the statutory condition precedent to the assessment.
3. Without the accrual and a lawful determination of special benefits to the land of the plaintiffs, the defendant-Town could not lawfully make any assessment upon such land.

4. The defendant-Town should have excluded the land of the plaintiffs from the boundaries of the Town sewer system and in failing to hear and determine whether the land of the plaintiffs should be excluded from the district, the defendant-Town denied the plaintiffs due process of law when it levied its assessment against them.

Inasmuch as propositions one, two and three are closely interrelated, we will combine our consideration of them in the following discussion.

Appellee-Town of Clermont contends that the assessment against Walter E. Fritz and Ramona J. Fritz was valid because it was an "area assessment." Such assessments are provided for under § 48-3957, *supra,* when the proposed sewer is intended to receive sewage from collateral drains.

Appellants do not contend that the apportionment of the cost of the trunk and main sewers is contrary to the provisions of § 48-3957, *supra.* Rather, the thrust of their contention is that the Town failed to consider the special benefits to their land in light of the pre-existing sewer in making the assessment.

The concept of "special benefits" encompassed within the statutes here in question was given lengthy consideration in *Indiano v. City of Indianapolis* (1971), —— Ind. App. ——, 269 N.E. 2d 552, 25 Ind. Dec. 455. *Indiano* relies on *Hubenthal, et al. v. Grain, et al.* (1959), 239 Ind. 646, at 650, 159 N.E. 2d 850, at 852-853, wherein it is stated:

> " ' In determining whether lands are benefited, special benefits only may be considered, and not the general benefits which accrue to the landowner as a member of the community. Benefits are special when they increase the value of the property, relieve it from

II.

IN THE

Appellate Court of Indiana

CAUSE NO. 1171 A 229

WALTER E. FRITZ and RAMONA J. FRITZ,	)	
Appellants, (Plaintiffs Below)	)	Appeal from the Marion County Superior Court, Room 1
v.	)	
THE TOWN OF CLERMONT,	)	Honorable Charles C. Daugherty, Judge
Appellee. (Defendant Below)	)	

APPELLANTS' PETITION FOR REHEARING DENIED, WITHOUT OPINION. MARCH 21, 1973.

/s/ GEORGE B. HOFFMAN, JR.
GEORGE B. HOFFMAN, JR.
Chief Judge

III.

IN THE

Supreme Court of Indiana

Appeal from Marion County Superior Court Room 1
Honorable Charles C. Daugherty, Judge

WALTER E. FRITZ and RAMONA J. FRITZ,	)	
Appellants, (Plaintiffs Below)	)	
v.	)	CAUSE NO. 1171 A 229
THE TOWN OF CLERMONT,	)	
Appellee, (Defendant Below)	)	

"Appellants' Petition for Transfer" is hereby DENIED this 19th Day of February, 1974.

All Justices Concur.

/s/ DONALD H. HUNTER
DONALD H. HUNTER
ACTING CHIEF JUSTICE